SUPREME COURT, U.S.
FILED
NOV 12 1959
JAMES R. BROWNING, Clerk

No. 525 IN THE SUPREME COURT OF THE UNITED STATES

ERMA F. SPRINGER, MURL D. SPRINGER, CLARE GOODMAN, FORREST M. E. JOHNSON, ANNA GULCH, Administratrix of the Estate of Stephen Stanley Gulch, Deceased, DOROTHY E. SWARTZ, Administratrix of the Estate of HAROLD SWARTZ, Deceased, and INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Petitioners,

vs.

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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INDEX

	Page
Appendix	14
Argument	5
Sufficiency of Evidence Test	5
Issues of Fact on Special Interrogatories	7
Counsel did not comply with Rule 51	12
Concise Statement of the Case	3
Constitutional Provisions and Court Rules	2
Jurisdiction of this Court	1
Opinion	14
Questions Presented for Review	2
Table of Authorities	ii

TABLE OF AUTHORITIES CITED

	Page
American Fidelity Co. vs. Ginsburg, 187 Mich. 264	8
Conley vs. McDonald, 40 Mich. 150	6
Davis vs. New York Central R. Co., 348 Mich. 262	6, 9
DeHaan vs. Marvin, 331 Mich. 231	8
Dick vs. New York Life Ins. Co., 359 U. S. 437	5, 6, 13
Galloway vs. U. S., 319 U. S. 372	11, 12
General Accident Fire & Life Ins. Corp. vs. J. Ray Browne, 214 F. 2d 418	8
Goldale vs. Portage Lake Bridge Co., 55 Mich. 413	6
Hansen vs. St. Joseph Fuel Oil & Mfg. Co., 181 F. 2d 880, certiorari denied 340 U. S. 865	12
Hilburn vs. Citizens Mutual Auto. Ins. Co., 339 Mich. 494	9
Howard vs. Chrysler Corp., 275 Mich. 706	6
Johnson vs. Chesapeake & Ohio Ry. Co., 227 F. 2d 858	12
Lintern vs. Zentz, 327 Mich. 595	9
Mynning vs. D. L. & R. R. Co., 64 Mich. 93	6
Nash vs. New York Life Ins. Co., 272 Mich. 680	11
Phillips vs. Hirsch, 292 Mich. 693	11
Puett vs. Walker, 332 Mich. 117	10, 11
Slater vs. Walter, 148 Mich. 650	6
Solorio vs. Atchinson, Topeka & Santa Fe Ry. Co., 224 F. 2d 544	12
Tennant, Adm'x vs. Peoria, et al, 321 U. S. 29	12
28 U. S. C. A., Sec. 1254	2
United States Constitution, Amendment VII U. S. C. A. Constitution, page 379	2
28 U. S. C. A. Rules, pages 511-12	3

IN THE

SUPREME COURT OF THE UNITED STATES

ERMA F. SPRINGER, MURL D. SPRINGER, CLARE GOODMAN, FORREST M. E. JOHNSON, ANNA GULCH, Administratrix of the Estate of Stephen Stanley Gulch, Deceased, DOROTHY E. SWARTZ, Administratrix of the Estate of HAROLD SWARTZ, Deceased, and INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Petitioners,

vs.

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners herein include the widows (as personal representatives) of men killed, and two men seriously injured, in an automobile collision. They hereby pray that a writ of certiorari issue to review the judgment entered against them in the United States Court of Appeals for the Sixth Circuit on August 28, 1959. The Opinion upon which this judgment is based is dated August 28, 1959, and reported as Case No. 13,594 in 269 F. 2d 805. Copy of the Opinion is appended.

JURISDICTION OF THIS COURT

The judgment sought to be reviewed is dated and was entered August 28, 1959.

An order denying rehearing was dated October 7, 1959. An order staying proceedings for 30 days within which to

petition for certiorari was dated and entered October 19, 1959. It further provided, "that if application for writ of certiorari is filed in the Supreme Court within said thirty days then the stay shall operate until the final disposition of the case by the Supreme Court."

To sustain the jurisdiction of this Court and have writ of certiorari granted, petitioners rely upon 28 *U. S. C. A.*, Section 1254, and the provisions of Amendment VII to the United States Constitution, which preserves to petitioners the right to trial by jury.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in applying the federal test as to sufficiency of evidence, instead of the Michigan rule requiring any evidence, "however slight", to be submitted to the jury, in determining issues of fact in a diversity of citizenship case?

2. Can the Court of Appeals, contrary to the holdings of the Supreme Court, deny petitioners a trial by jury where there is sufficient evidence in the record consistent with the jury's finding that answers to questions in an application for automobile insurance were true and that there was no rescission of said insurance policy, and where the trial judge refused to set aside the verdict of the jury?

3. Did the Court of Appeals err in holding that the judgment of the District Court should be reversed for alleged error in submitting to the jury three special interrogatories where appellant-insurance company's counsel did not object on the record to submission of such special interrogatories, as required by Rule 51 of the Federal District Court Rules of Civil Procedure?

CONSTITUTIONAL PROVISIONS AND COURT RULES

The constitutional provision involved is Amendment VII, found in *U. S. C. A.*, Constitution, page 379, viz.:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a

jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Federal District Court Rule 51 involved is found in 28 *U. S. C. A.*, Rules, pages 511-12, viz.:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the request prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

CONCISE STATEMENT OF THE CASE

Two men were killed and two others seriously injured when an automobile operated by Murl D. Springer ran a red traffic signal and stop sign and collided with a vehicle driven by Harold Swartz on November 13, 1955 (11a and 12a). The killed and injured were all occupants of the Swartz vehicle. They or their widows, as personal representatives, are the principal petitioners herein (11a and 12a). The Springer automobile had been insured for nearly two years preceding the accident (since April 2, 1954) by policy of the Allstate Insurance Company, Respondent herein, providing for public liability protection with limitations of $10,000 for injury to any one person and $40,000 to four or more persons in any one accident (317a).

Subsequent to the fatal accident, the Respondent Insurance company instituted a Declaratory Judgment action in the United States District Court for the Western District of Michigan against its insured, Erma F. Springer, owner of the death vehicle, and her husband, Murl D. Springer,

driver, as well as the petitioners herein, seeking a declaration of rights to void said policy and avoid liability thereunder (6a-16a). Jurisdiction of the District Court was invoked on the basis of diversity of citizenship and the amount in controversy (6a). Respondent insurance company claimed that the policy was void from its inception by reason of allegedly false answers to questions 6 and 7 in the original policy application (13a). Petitioners herein and the insured owner and operator of the death vehicle claim that the questions were answered truthfully (234a).

The insurance company further claims that the policy was rescinded *after* the fatal accident by a letter to Erma F. Springer enclosing a check for the premiums (32a). Petitioners claim the amount was insufficient (44b). The letter was opened by *Mr.* Springer and the check cashed by him *without* Mrs. Springer's knowledge (240a). Mr. Springer in fact forged her signature (240a). Mrs. Springer never saw the check until the trial of this case. She never read the letter of alleged rescission (252a).

In accordance with the answers of the jury to the three special interrogatories submitted (294a-295a), the United States District Court, Hon. Raymond W. Starr, entered on April 10, 1957, a judgment declaring the policy valid from its inception and in full force and effect as of the date of the accident (296a-297a). The Trial Judge, a former Justice of the Michigan Supreme Court, is an eminent Federal trial jurist of many years' experience, without prior reversal of his decisions. After giving this case meticulous study and attention, he denied respondent insurance company's motions for a new trial and judgment for respondent (300a-314a).

The Circuit Court of Appeals reversed the case.

ARGUMENT

SUFFICIENCY OF EVIDENCE TEST

The Court of Appeals in setting aside the jury's findings as to the three special interrogatories, obviously adopted the Federal test on sufficiency of evidence. The opinion stated:

> "We are of the opinion that a review of the evidence in the light most favorable to the appellee, together with all the inferences that justifiably could be drawn therefrom, fails to reveal sufficient evidence of probative value to take this issue to the jury."
>
> (269 F. 2d 805, 809).

Petitioners submit that the test of sufficiency as enunciated by the Supreme Court of Michigan (requiring any evidence, "however slight", to be submitted to the jury) should have been applied by the Court of Appeals in this case founded on diversity of citizenship.

Mr. Chief Justice Warren, in the recent case of *Dick vs. New York Life Ins. Co.*, 359 U. S. 437, observed a conflict in the various circuits as to whether the state test or federal test on sufficiency of evidence should be applied:

> "Lurking in this case is the question whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. On this question, the lower courts are not in agreement. Compare Rowe v. Pennsylvania Greyhound Lines, 231 F. 2d 922; Cooper v. Brown, 126 F. 2d 874; Lovas v. General Motors Corp., 212 F. 2d 805, with Davis Frozen Foods v. Norfolk Southern R. Co., 204 F. 2d 839; Reuter v. Eastern Air Lines, 226 F. 2d 443; Diederich v. American News Co., 128 F. 2d 144. And see Morgan, Choice of Law Governing Proof, 58 Harv. L. Rev. 153, 174, and 5 Moore's Federal Practice (2d ed. 1951) Sec. 38.10. But the question is not properly here for decision * * *. A decision as

to which standard should be applied can well be left to another case where the question is briefed and argued."

Dick vs. N. Y. Life Ins. Co., 359 U. S. 437, 444-5.

The Michigan rule is considerably different from the federal test on sufficiency of evidence, which was applied by the Court of Appeals in this case. In *Howard vs. Chrysler Corp.*, 275 Mich. 706, the court reaffirmed the following doctrine earlier laid down in *Conley vs. McDonald*, 40 Mich. 150, 158:

"'Where there is a total defect of evidence as to any essential fact, or a spark, the least particle, a scintilla as it is termed, the case should be withdrawn from the consideration of the jury. Where, however, the evidence introduced has a legal tendency to make out a proper case in all its parts, then, although it may in the opinion of the trial court or the appellate court be slight, inconclusive, and far from satisfactory, yet it should be submitted to the jury, whose proper province it is to consider and determine its tendency and weight.'"

Howard vs. Chrysler Corp., 275 Mich. 706, 710.

In *Slater vs. Walter*, 148 Mich. 650, the Michigan Supreme Court declared at pages 653-4:

"Where there is evidence, however slight, which should go to a jury, the question is one for the jury, and not the court, to determine."

To the same effect, see *Goldale vs. Portage Lake Bridge Co.*, 55 Mich. 413, 417:

"'It is only when there is an entire want of evidence upon some material point in the case that the court is warranted in taking the case from the jury."

See also *Davis vs. New York Central R. Co.*, 348 Mich. 262, and *Mynning vs. D. L. & R. R. Co.*, 64 Mich. 93.

The obvious conflict among the various Federal Circuit Courts as to whether the state or federal rule should control can only be resolved by the Supreme Court.

ISSUES OF FACT ON SPECIAL INTERROGATORIES

The District Trial Judge submitted to the jury the following special interrogatories:

> "Was the answer of defendant Erma F. Springer to the following question in her application for the policy true or false?
>
> " '6. During the past two years has any insurer cancelled any automobile insurance issued, or refused any automobile insurance to the applicant or to any of his household? ( ) Yes (x) No.'
>
> Answer True or False: TRUE.
>
> "Was the answer of defendant Erma F. Springer to the following question in her application for the policy true or false?
>
> " '7. During the past two years, has any automobile license, or permit to applicant or to any of his household to drive an automobile been suspended, revoked or refused? ( ) Yes (x) No.'
>
> Answer True or False: TRUE" (294a-295a).

In the face of these jury findings that the answers were true, the Circuit Court of Appeals erroneously substituted its judgment for that of the jury and determined that the answers to the questions on the application were "obviously false".

In so doing, the Court completely disregarded the testimony of Mr. and Mrs. Springer. Both testified they had not received written notice of cancellation of a prior insurance policy (49a, 225a). Mr. Springer stated he had "voluntarily * * * surrendered it" (102a-103a). No insurance company had refused the Springers automobile insurance. Mr. Springer simply had declined to accept a policy

offered by St. Paul-Mercury Insurance Company due to the high cost thereof (53a).

The holding of the Court of Appeals in contravention of this testimony was also contrary to the applicable rules of law.

> "There is a presumption that the notice of cancellation was received by Marvin, but like all presumptions it fades away in the light of the testimony of Marvin that he did not receive the notice of cancellation. In such a case, a question of fact is raised that should be determined by the trier of the facts. The trial court was in error in failing to submit this issue to the jury."
>
> *DeHaan vs. Marvin*, 331 Mich. 231, 241.

See also the case of *American Fidelity Co. vs. Ginsburg*, 187 Mich. 264, where the Michigan Supreme Court, in a similar situation, concluded at page 277:

> "This points in the finality to a transaction of surrender by mutual agreement rather than of arbitrary cancellation."

The Sixth Circuit Court of Appeals' decision in the case at bar is also in direct conflict with the Seventh Circuit Court of Appeals' decision, where that court held:

> "Where insured surrendered automobile liability policy pursuant to insurer's request for return of policy for cancellation, but no notice of cancellation was given in manner provided for in policy, which also permitted insured to cancel policy by surrender thereof, insured's surrender of policy *was not a cancellation by insurer*, and policy issued to insured by subsequent insurer was not void on ground that statement that insured had not had a policy cancelled by another insurer was a misrepresentation and concealment of matters material to the risk." (Italics ours).
>
> *General Accident Fire & Life Ins. Corp. vs. J. Ray Browne* (C. C. A. 7th 1954) 217 F. 2d 418.

The Court of Appeals failed to recognize and apply the well established Michigan law that questions and answers in an application for insurance must be construed liberally in favor of the insured and strictly against the insurer. *Hilburn vs. Citizens Mutual Auto. Ins.*, 339 Mich. 494; *Lintern vs. Zentz*, 327 Mich. 595.

The proof further showed that a prior 90-day suspension of Mr. Springer's driver's license occurred more than two years prior to Mrs. Springer's application for the Allstate Insurance (7a, 317a). It therefore was without the scope of that question in the application (317a). Mr. Springer testified that upon surrendering his Citizens' Mutual policy, he voluntarily surrendered his driver's license by mailing the same in to the Secretary of State (59a, 78a-79a). He did not again drive until his license was restored (228a).

Mrs. Springer, the insured, testified: "I did not answer any question falsely, absolutely not" (234a).

> "In considering the matter, we must necessarily have in mind the general rule that the proofs offered by plaintiff must be construed as strongly as possible in his favor. Thompson v. Michigan Cab Co., 279 Mich. 370; Grover v. Simons, 342 Mich. 480. The rule is applicable, notwithstanding that certain inconsistencies and contradictions may be deemed to exist in plaintiff's testimony. Yampolsky v. Smith, 320 Mich. 647."
>
> *Davis vs. N. Y. Central R. Co.*, 348 Mich. 262, 267.

The jury also found, in answer to a special interrogatory, that the policy of insurance involved herein had not been rescinded (294a). There is ample evidence to sustain this jury finding.

In its letter of December 20, 1955, addressed to the insured, Erma F. Springer, Allstate Insurance Company did not make clear by the language therein employed that the accompanying refund check could be cashed only on the understanding and condition that a rescission of the policy

was thereby effectuated. The letter in respect to the accompanying check merely stated:

> "Our check in the amount of $143.75, to cover full refund of premium paid by you since the original inception date of your policy, is enclosed" (326a).

In the case of *Puett vs. Walker*, 332 Mich. 117, the Michigan Supreme Court expressly held:

> "An accord and satisfaction results only where the act of the creditor in 'taking the check would be tortious, except on the assumption of a taking in full satisfaction.' * * *
>
> " 'If defendant honestly sought an accord and satisfaction, it could have and should have plainly advised plaintiff that acceptance of the $375.00 must be upon the express condition that it satisfied any claim for breach of the employment contract which plaintiff might otherwise assert.' "
>
> *Puett vs. Walker*, 332 Mich. 117, 125.

The Springers are unskilled laborers (63b, 40b) with only eighth and seventh grade educations respectively (63b, 40b). They could not be expected to understand this letter. The proof is undisputed that Mrs. Springer, the insured, never saw the check until it was produced in court the day of the trial of this case (240a). She had never read the letter (252a). Mr. Springer had opened the letter addressed to Mrs. Springer, had forged her signature to the check and cashed it about two days before Christmas (240a).

The Court of Appeals inferentially acknowledged there had been no meeting of the minds between Allstate Insurance Company and its insured, Erma Springer, but substituted its opinion for that of the jury and concluded, "There is no question under the evidence but that Murl Springer was authorized to handle the matter of insurance for his wife * * *." (269 F. 2d 805, 810). In fact, the record indicates that Mrs. Springer, herself, dealt with the insurance company, ordered the particular coverage desired (70a-71a) and paid for the insurance (85a). She also dealt directly

with the adjusters of Allstate Insurance Company (222a, 223a, 237a).

As stated by the Michigan Supreme Court in a recent decision:

> "As to (3), which alone we think states a sufficient reason for affirming the circuit judge's decision, it is apparent from this record that there never has been a meeting of minds between these litigants which resulted in an accord and satisfaction."
>
> *Puett vs. Walker*, 332 Mich. 117, 124.

See also *Phillips vs. Hirsch*, 292 Mich. 693.

The Michigan Supreme Court has also held:

> "Though an insurance policy may ordinarily be cancelled by surrender of the policy by the insured to the insurer and the acceptance of the unearned premium or cash surrender value thereof, surrender and cancellation of an insurance policy will not relieve the insurer from liability incurred prior to its surrender and cancellation."
>
> *Nash vs. N. Y. Life Ins. Co.*, 272 Mich. 680, 682.

A careful review of the record at bar demonstrates clearly that questions of fact for the jury were established on all three issues. The Court of Appeals' judgment in setting aside the jury verdict deprives petitioners of their constitutional right to trial by jury.

Mr. Justice Black, in speaking of the Appellate Court's concern to preserve trial by jury, observed in *Galloway vs. United States*, 319 U. S. 372, 407:

> "As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preser-

vation of this constitutional right even though each case necessarily turns on its peculiar circumstances."

Galloway vs. U. S., 319 U. S. 372, 407.

COUNSEL DID NOT COMPLY WITH RULE 51

Appellant's counsel failed to object to the special interrogatories submitted to the jury (289a-292a), even though specifically so requested by the court (292a). The record is undisputed that the only exception appellant's counsel made to the actual jury charge related solely to the matter of the insurance company being charged with the knowledge of its agent (289a).

Interpreting District Court Rule 51 in *Solorio vs. Atchinson, Topeka & Santa Fe R. Co.*, (C.C.A. 10) 224 F. 2d 544, 546, the court said:

> "It blueprints with meticulous care the juncture at which and the manner in which objections shall be made. * * * And in respect to manner or substance, it provides that the grounds of objection shall be stated distinctly."

Also see *Johnson vs. Chesapeake & Ohio Ry. Co.*, (C.C.A. 7) 227 F. 2d 858; *Hansen vs. St. Joseph Fuel Oil & Mfg. Co.*, (C.C.A. 8) 181 F. 2d 880, certiorari denied 340 U. S. 865.

Petitioners recognize that writs of certiorari are sparingly granted. However, failure to follow the Michigan law and the deprivation to petitioners of their rights to trial by jury are of extreme importance to the bench, bar and citizens of the State of Michigan, as well as the petitioners herein. Petitioners' rights to a trial by jury, as guaranteed by Amendment VII of the United States Constitution, have been denied. The Circuit Court of Appeals' decision violates the repeated rule laid down by this court, that "a court is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions, or because the court regards another result as more reasonable.", *Tennant, Adm'x vs. Peoria, et al*, 321 U. S. 29. The recent holding of this court in *Dick vs. N. Y. Life Ins. Co.*, 359 U. S. 437, decided May 18, 1959, is positively controlling of the present action, this court having there stated:

"In our view, the Court of Appeals improperly reversed the judgment of the District Court. It committed its basic error in resolving a factual dispute in favor of respondent * * *. (p. 445).

"After all the evidence was in, the district judge, who was intimately concerned with the trial and who has a first-hand knowledge of the applicable state principles, believed that the case should go to the jury. Under all the circumstances, we believe that he was correct * * *: (p. 447).

Dick vs. N. Y. Life Ins. Co., 359 U. S. 437, 445, 447.

WHEREFORE, it is respectfully submitted that petitioners' prayer for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals should be granted.

Dated: November 6th, 1959.

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

NO. 13,594

ALLSTATE INSURANCE COMPANY,

Appellant,

vs.

ERMA F. SPRINGER, MURL D. SPRINGER, CLARE GOODMAN, FORREST M. E. JOHNSON, ANNA GULCH, Administratrix of the Estate of Stephen Stanley Gulch, Deceased; DOROTHY E. SWARTZ, Administratrix of the Estate of HAROLD SWARTZ, Deceased, and INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Appellees.

(Decided August 28, 1959)

Appeal from the United States Court for the Western District of Michigan, Southern Division

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OPINION

Before: Simons and Miller, Circuit Judges, and Shelbourne, District Judge.

Miller, Circuit Judge. Appellant, Allstate Insurance Company, brought this declaratory judgment action seeking an adjudication that a policy of automobile liability insurance, issued by it to the appellee Erma F. Springer, was void from its inception for fraud and afforded no benefits or protection to the insured or to any of the appellees making claims thereunder. Following a trial by jury which

returned special verdicts, the appellant's contention was rejected by the District Court.

The insurance policy covered a Buick automobile which, prior to March 17, 1954, was owned by the appellee Murl D. Springer and who on or about that date transferred it to his wife, Erma F. Springer. On April 2, 1954, Erma Springer made written application to the appellant for liability insurance and the appellant issued to her the insurance policy in question covering the Buick automobile for a term of twelve calendar months ending April 3, 1955. At the expiration of that term the appellant issued a certificate extending the policy coverage for an additional period of one year until April 3, 1956.

On November 13, 1955, Murl Springer who, with the consent of his wife, was driving the insured automobile, collided with a Plymouth automobile owned and driven by Harold Swartz. Swartz and Stephen Gulch, a passenger in his car, died as a result of injuries received in the accident. Two other occupants of the Swartz car, appellees Clare Goodman and Forrest M. E. Johnson, were injured.

Appellant contends that the insurance policy covering the Buick automobile, and the extension thereof, were null and void because of false and fraudulent statements made by Erma Springer in her answers to questions Nos. 6 and 7 in her application for the policy. These questions read as follows:

> "6. During the past two years, has any insurer cancelled any automobile insurance issued, or refused any automobile insurance to the applicant or to any of his household?
>
> "7. During the past two years, has any automobile license, or permit to applicant or to any of his household to drive an automobile been suspended, revoked or refused?"

After each question was a square followed by the word "yes" and a second square followed by the word "no" for use in indicating the answers. In each instance checks were inserted in the squares marked "no." The applica-

tion contained the following statement, "I hereby declare the facts stated herein to be true and request the Company to issue the insurance, and any renewals thereof, in reliance thereon." The application was signed by Erma F. Springer, although it is admitted that she herself did not fill in the answers to questions 6 and 7. Appellant's evidence was that the check marks in the "no" squares were made by appellant's agent at the time the application was made out, in accordance with statements made by Erma Springer.

The following facts have an important bearing upon questions 6 and 7 and the answers thereto. On October 5, 1951, Murl D. Springer was arrested on a charge of driving while under the influence of intoxicating liquor, to which he pleaded guilty. His driver's license was revoked for a period of ninety days, and he became subject to the provisions of the Michigan Financial Responsibility Act for a period of three years. At that time he owned a 1949 Chevrolet automobile. In order to obtain the restoration of his driver's license, he made application to Citizens' Mutual Automobile Insurance Company for a policy conforming to the requirements of the Financial Responsibility Act. The policy was issued and the Secretary of State issued to Springer a restricted driver's license, authorizing him to operate only the Chevrolet automobile. During the early part of 1953 Springer replaced the Chevrolet automobile with a 1952 Buick and Citizens' Mutual issued a policy covering the Buick automobile, effective until December 14, 1953. A corrected limited license was issued to Springer to operate only the Buick. On December 14, 1953, the coverage was made effective until December 14, 1954. Between October 10, 1952, and December 24, 1953, Murl Springer was involved in three traffic violations. On November 14, 1953, he was involved in a wreck and pleaded guilty to a charge of not having his car under control. On February 2, 1954, Citizens' Mutual served Springer by mail with a notice of cancellation of his policy, effective February 16, 1954. Springer was also notified by telephone by his insurance agent of the cancellation, and was requested to bring in his policy. He delivered the policy to the agent and received a check for the premium refund.

The agent told him that the cancellation was on account of the wreck.

Under the Michigan Financial Responsibility Act, Springer was not permitted to drive the Buick automobile unless it was covered by insurance. Springer, acting through his insurance agent, signed two applications for insurance under the Assigned Risk Plan. The premium for such insurance was larger than it would have been if he had not been under the Financial Responsibility Act, and Springer decided not to take such a policy. After the expiration of the thirty days allowed for the purpose of obtaining insurance his driver's license was taken up by the Office of the Secretary of State on March 17, 1954. On the same day Springer transferred title of the Buick automobile to his wife, Erma Springer, without consideration therefor. Thereafter, Springer requested the appellant to have one of its agents call at the Springer residence to discuss insurance for the Buick automobile and agent Baker went there on April 2, 1954, for that purpose, at which time the application in question was made by Erma Springer, upon the basis of which the policy was issued.

Appellant's investigation of the accident caused it to also investigate Murl Springer's driving record. By letter of November 16, 1955, it notified Erma Springer that its investigation of the accident and any actions with respect thereto on its part were being done under a reservation of rights because of the incorrect answers in the application for insurance. Under date of December 20, 1955, the appellant notified Erma Springer by letter that it was declaring the policy void from the date of its inception. This letter closed with this statement, "Our check in the amount of $143.75, to cover full refund of premium paid by you since the original inception date of your policy, is enclosed." This letter was received at the Springer residence. Murl Springer endorsed Erma Springer's name and his own name on the back of the check which he thereafter cashed. He used the money, with his wife's knowledge, to buy Christmas presents. Erma Springer testified that her husband endorsed her name on the check and cashed it with her full consent.

The District Judge overruled appellant's motion for a directed verdict and submitted the case to the jury for answers to written interrogatories. Following the verdict, appellant moved for judgment notwithstanding the verdict and in the alternative for a new trial. The District Judge called attention to the fact that a motion for judgment notwithstanding the verdict is not expressly recognized in the Rules of Civil Procedure, but properly treated it as a motion under Rule 50 (b), Rules of Civil Procedure, and denied it. *Cone v. West Virginia Paper Co.*, 330 U. S. 212, 215; *Shaw v. Hines Lumber Co.*, 249 F. (2) 434, 437, C. A. 7th; *Moore v. Capital Transit Co.*, 226 F. (2) 57, note 1, p. 58, C. A. D. C., cert. denied, 350 U. S. 966. He also overruled the motion for a new trial. The general rule that the overruling of a motion for a new trial is not reviewable except for abuse of discretion is not applicable where the error involved is one of law. *Reisberg v. Walters*, 111 F. (2) 595, C. A. 6th; *General American Life Ins. Co. v. Central National Bank*, 136 F. (2) 821, 823, C. A. 6th; *Legler v. Kennington-Saenger Theatres*, 172 F. (2) 982, 984, C. A. 5th; *Astles v. Quaker City Bus Co.*, 158 F. (2) 979, 980, C. A. 2nd. Accordingly, even though appellant may not have been entitled to a directed verdict, our present review will include errors of law, if any, in submitting the case to the jury.

Two of the interrogatories asked the jury if the answers of Erma Springer to questions 6 and 7 in the application were true or false. The jury found that the answer to each question was "true." The judgment holding the insurance policy valid from its inception was based upon these findings.

In support of the action of the District Judge, appellees refer to the testimony of Erma and Murl Springer that they truthfully answered all questions asked of them by appellant's soliciting agent; that the soliciting agent did not ask them questions numbered 6 and 7; that the soliciting agent, or some other representative of the appellant at a later time, filled in the answers to questions 6 and 7 in the application; and that they did not know that such answers had been made in the application when it was signed by Mrs. Springer. They contend that this evidence

raised a factual issue about the answers to questions 6 and 7 and sufficiently supported the two findings of the jury on those issues. *Hughes v. John Hancock Life Insurance Co.*, 351 Mich. 302, 306, 312.

We are of the opinion that the evidence was sufficient to take to the jury such questions as whether the soliciting agent asked Erma and Murl Springer questions 6 and 7 and whether they answered them as indicated by the check marks on the application. *Cebulak v. Lewis*, 320 Mich. 710. But those are not the questions which were submitted to the jury. The questions submitted to the jury were whether the negative answers shown by the signed application were true or false. The evidence is uncontradicted and conclusive that the negative answers were false and that Erma Springer signed the application. Whether, under all the circumstances surrounding the signing of the application, she was bound by the questions and answers thereto, is an entirely different question. Questions 6 and 7 should not have been submitted to the jury. *Lovas v. General Motors Corp.*, 212 F. (2) 805, 807-808, C. A. 6th; *Wilson v. Goscinske*, 233 F. (2) 759, 762, C. A. 6th; *Manos v. Detroit United Railway*, 168 Mich. 155, 162; *Merritt v. Huron Motor Sales, Inc.*, 282 Mich. 322, 326. The jury's answers to questions 6 and 7, as drafted, must be set aside, and the judgment based upon them necessarily falls.

Another interrogatory submitted to the jury asked the jury if Erma Springer, by accepting and cashing the appellant's check for $143.75 as a refund of premium in accordance with its letter of December 20, 1955, understood that the appellant was declaring the policy void and did she intend at that time to acquiesce in and consent to the appellant's rescission and avoidance of the policy. The jury answered this question "no." We are of the opinion that a review of the evidence in the light most favorable to the appellee, together with all the inferences that justifiably could be drawn therefrom, fails to reveal sufficient evidence of probative value to take this issue to the jury.

We recognize the Michigan rule that to constitute an accord and satisfaction, the tender of payment as being in full should be made in unequivocal terms so that the credi-

tor in accepting the payment will do so understandingly. *Durkin v. Everhot Heater Co.*, 266 Mich. 508, 513. In our opinion, the written exhibits and the unequivocal admissions of Erma Springer conclusively show that she fully understood the purpose of the tendered check and its effect, if accepted, upon the policy of insurance. The appellant's letter of December 20, 1955, reads as follows:

"Mrs. Erma Springer
2512 Reynolds Street
Muskegon Heights, Michigan

Dear Mrs. Springer:

The Allstate Insurance Company does hereby declare void from the date of its inception the policy numbered 6313346-4,3, issued to you.

Please take notice that the voidance of this policy leaves you without insurance protection by our company with reference to the accident in which your car was involved, while being driven by your husband, Murl Springer, occurring on November 13, 1955, at the intersections of Routes M-20 and M-37 in White Cloud, Michigan. Therefore, the said company hereby disclaims and denies to you and to others, any and all liability or obligation under such policy, relative to the said accident or otherwise.

We have declared such policy to be void because our investigation has revealed the following: 1) During the two years preceding April 3, 1954, an insurer cancelled automobile insurance issued to your husband, Murl Springer, a member of your household; 2) During the two years preceding April 3, 1954, the driver's license of your husband, Murl Springer, a member of your household, was under suspension, and 3) for other reasons.

The Allstate Insurance Company will take no further action with respect to any claim which you may have against it or with respect to any claim or suit against you which has arisen, or which may arise out of the said accident, and hereby withdraws from the matter entirely.

> Our check in the amount of $143.75, to cover full refund of premium paid by you since the original inception date of your policy, is enclosed."

The appellant in its letter of November 16, 1955, to Erma Springer, in which it made a reservation of rights in its investigation of the accident, contained this statement:

> "We are making this reservation of rights because of breach of declarations relating to prior auto insurance cancellation or refusals to you or any member of your household and breach of declarations relating to prior drivers license revocations suspensions etc., and for other reasons."

Erma Springer testified that she read enough of the letter to know that the company had cancelled the policy and that she was not insured at the time of the accident. The following is quoted from her testimony:

> "Q. What did you tell him at that time?
> "A. I said: 'Why, Mr. Marks, are you trying to tell me that I am not insured, after having this policy for nearly two years, paying for it on two different occasions, and now you are finally going to drop us?' He said, 'That's it, that's it.' I said: 'I can't understand it.' I said: 'When we need you so bad now, there has two people been killed, and — .'"

There is no question under the evidence but that Murl Springer was authorized to handle the matter of insurance for his wife and to endorse and cash checks drawn to her order. In addition to other testimony, the District Judge asked her the following questions, to which she made the following answers: "Witness, I don't want any uncertainty about this question: Your husband endorsed your name on this check, and you claim he cashed it with your full consent? A. Yes, sir. The Court: And everything he did in connection with this insurance was done with your consent, was it? A. Yes." Erma Springer also knew that her husband used the proceeds of the check to

buy Christmas presents and made no objection thereto.

Although we think this question was improperly submitted to the jury and that the jury's finding in answer thereto must be set aside, we do not at this time rule on the legal effect of this offer and acceptance. A policy of insurance is a contract between the insurer and the insured and, like other contracts, may be cancelled by mutual agreement, in the absence of intervening rights. *Aetna Life Ins. Co. v. Dodd*, 103 F. (2) 793, 795, C. A. 8th, cert. denied, 308 U. S. 573, rehearing denied, 308 U. S. 634, 637; *New Zealand Insurance Co. v. Larson Lumber Co.*, 13 F. (2) 374, 375, C. A. 7th; *Denler & Denler Land Co. v. Eby*, 277 Mich. 360, 364.

What effect an attempted retroactive cancellation by the parties has upon possible intervening non-consenting beneficiaries under the policy, who may have acquired rights by reason of an accident covered by the policy and the policy provisions with respect thereto, is a question which arises under our ruling on this aspect of the case and which has not had the consideration of the District Judge. See cases cited in *Corpus Juris Secundum, Insurance, Sections 459 and 588*, and *Contracts, Section 390*.

The judgment is reversed and the case remanded to the District Court for a new trial in accordance with the views expressed herein.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 525

EMMA F. SPRINGER, MURL D. SPRINGER, CLARE GOODMAN, FORREST M. E. JOHNSON, ANNA GELCH, Administratrix of the Estate of Stephen Stanley Gulch, Deceased, DOROTHY E. SWARTZ, Administratrix of the Estate of Harold Swartz, Deceased, and INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,
Petitioners,

vs.

ALLSTATE INSURANCE COMPANY, an Illinois Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

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SUBJECT INDEX

	Page
CONCISE STATEMENT OF CASE	1-2
ARGUMENT	2-9
SUFFICIENCY OF EVIDENCE TEST	2-3
ISSUES OF FACT ON SPECIAL INTERROGATORIES	3-7
The Answers to Questions 6 and 7 Appearing in The Policy Declarations Were False	4-5
The Facts Relied Upon by Allstate to Sustain its Claim That a Rescission of The Policy Had Been Effected by Mutual Agreement of The Insurer and the Insured Were Undisputed	5-7
COUNSEL DID COMPLY WITH RULE 51	7-9
CONCLUSION	9

INDEX TO CASES AND AUTHORITIES CITED

	Page
Annotation: 152 A. L. R. 95	7
3 Appleman's Insurance Law and Practice. 439, Sec. 1831	7
Boudeman vs. Arnold, 200 Mich. 162	3
Burcham vs. J. P. Stevens & Co., (C.C.A. 4) 209 F. 2d 144	2
Coen vs. American Surety Co. of New York, (C.C.A. 8), 120 F. 2d 393	3
Corbett vs. Spencer, 63 Mich. 731	3
Davis Frozen Foods, Inc. vs. Norfolk Southern Ry. Co., (C. C. A. 4), 204 F. 2d 839	2

Page

Great Northern Life Ins. Co. vs. Vince, (C.C.A. 6), 118 F. 2d 232 4

Gunning vs. Cooley, 281 U. S. 90 3

Hillock vs. Traders Ins. Co., 54 Mich. 531 7

Klanian vs. New York Life Ins. Co., 68 R. I. 126, 26 A. 2d 608, 152 A. L. R. 87 7

Lange vs. Perley, 47 Mich. 352 3

Met'utchan vs. Kansas City Life Ins. Co., ... Mo. ....., 122 S. W. 2d 59 6

Michigan Vehicle Code, (Section 530), Act No. 300 of Public Acts of Michigan of 1949 (Compiled Laws of Michigan of 1948, Section 257.530; Mich. Stat. Anno., Section 9.2230) 5

Minor vs. Bewick, 55 Mich. 491 6

Mosser vs. Masons' Indemnity Co., 115 Mich. 672 7

Reuter vs. Eastern Air Lines, (C.C.A. 5) 225 F. 2d 443 2

Seligman vs. Estate of Ten Eyck, 49 Mich. 104 3

Smith vs. John Hancock Mutual Life Ins. Co., (C.C.A. 5), 249 F. 2d 657 4

White Pine Lbr. Co. vs. Manufacturers Lbr. Co., 191 Mich. 390 6

IN THE

SUPREME COURT OF THE UNITED STATES

No. 525

ERMA F. SPRINGER, MURL D. SPRINGER, CLARE GOODMAN, FORREST M. E. JOHNSON, ANNA GULCH, Administratrix of the Estate of Stephen Stanley Gulch, Deceased, DOROTHY E. SWARTZ, Administratrix of the Estate of Harold Swartz, Deceased, and INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,
Petitioners,

vs.

ALLSTATE INSURANCE COMPANY, an Illinois Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SIXTH CIRCUIT COURT OF APPEALS

CONCISE STATEMENT OF CASE

Respondent, Allstate Insurance Company, as plaintiff, brought an action against Erma F. Springer and her husband, Murl D. Springer, and others, as defendants, pursuant to the Declaratory Judgment Act to obtain an adjudication that a policy of automobile insurance issued by it to Erma F. Springer was void from its inception for fraud and should be cancelled, and that a rescission of the policy had been effected by mutual agreement of the insurer and the insured.

The facts are adequately stated in the opinion of the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I shall reply *seriatim* to the points of the petitioners' argument, under the captions adopted by them.

SUFFICIENCY OF EVIDENCE TEST

Federal district courts, on request, should direct a verdict or give peremptory instructions for party having burden of proof, if evidence establishes facts in his favor so clearly that reasonable men could entertain no doubt with regard thereto, even though State rule is purportedly to the contrary.

> *Davis Frozen Foods, Inc, vs. Norfolk Southern Ry. Co.* (C. C. A. 4), 204 F. 2d 839.

In determining whether there is sufficient evidence to take the case to the jury, a Federal judge performs a judicial function and is not a mere automaton, and must determine not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it. In this connection it should be noted that State court rule as to sufficiency of evidence does not apply in cases in Federal courts where jurisdiction is based upon diversity of citizenship, despite the Erie doctrine, since Federal rules provide for kind of jury trial in Federal courts that is preserved by the Seventh Amendment, and Erie doctrine is subservient to Constitutional provision.

> *Reuter vs. Eastern Air Lines* (C. C. A. 5) 226 F. 2d 443;
> *Burcham vs. J. P. Stevens & Co.* (C. C. A. 4) 209 F. 2d 35;
> *Diederich vs. American News Co.* (C. C. A. 10) 128 F. 2d 144.

Under Federal law, where the evidence upon any issue is all on one side, or so overwhelmingly on one side as to

leave no room to doubt what the fact is, the Court should give a peremptory instruction to the jury.

Gunning vs. Cooley, 281 U. S. 90;
Coen vs. American Surety Co. of New York (C. C. A. 8), 120 F. 2d 393.

Michigan law is not materially different.

Under Michigan law, where the testimony is all one way, is uncontradicted by any testimony given in the case by the witnesses of either party, either on direct or cross-examination, or by any facts or circumstances in the case, is not in itself in any way improbable or discredited, and but one legitimate inference may be drawn from it, and a case is thereby made for the plaintiff or a defense made for the defendant, the duty rests upon the Court to direct a verdict.

Boudemin vs. Arnold, 200 Mich. 162.

It is prejudicial error for a court to submit as open questions to the jury matters which are not in dispute, or upon which the testimony is not conflicting.

Lange vs. Perley, 47 Mich. 352;
Corbett vs. Spencer, 63 Mich. 731.

It is error to direct the attention of the jury to undisputed facts as if they were doubtful.

Seligman vs. Estate of Ten Eyck, 49 Mich. 104.

I shall demonstrate in the succeeding paragraphs that application of any of the foregoing tests to the record made in the present case will make it clear that the Court of Appeals correctly held that the District Judge erred in submitting to the jury the interrogatories labelled "First Question," "Second Question," and "Third Question," and in refusing to give to the jury peremptory instructions in keeping with Allstate's requests.

ISSUES OF FACT ON SPECIAL INTERROGATORIES

Long prior to the trial of this action, Federal courts had already recognized that a jury cannot declare a policy

of insurance null and void or direct its cancellation, and that in an action of this nature triable issues of fact must be submitted to the jury in the form of interrogatories. They also recognized, however, that it is error for a court to submit as open questions to the jury matters which are not in dispute or upon which the testimony is not conflicting.

Great Northern Life Ins. Co. vs. Vince (C. C. A. 6), 118 F. 2d 232;
Smith vs. John Hancock Mutual Life Ins. Co. (C. C. A. 5), 249 F. 2d 657.

The Answers to Questions 6 and 7 Appearing in The Policy Declarations Were False.

The answers made by Erma F. Springer to both questions 6 and 7 in her application for the policy of insurance were palpably false. Citizens' Mutual Automobile Insurance Company had cancelled a policy of automobile insurance issued by it to her husband within less than sixty days prior to the date of her application to Allstate. On the trial of the action, counsel for petitioners advanced the theory, which they now urge before this Court, that the Citizens' Mutual policy was terminated through voluntary surrender thereof by Murl D. Springer and not by cancellation. The District Judge properly rejected this theory. The Court's ruling appears in the Appendix as follows (102a, 103a):

"Q. Mr. Springer, when you got this telephone call from Mr. Gomery, did you then take the policy of insurance voluntarily —

"A. (Interrupting): Yes, sir.

"Q. (Continuing): — in to Mr. Gomery's, and surrender it?

"A. Yes, sir.

"Q. And that policy and your surrender of it was accepted by Mr. Gomery, is that right?

"A. Yes, sir.

"MR. ROGOSKI, SR.: I object to that as calling for an incompetent conclusion.

"THE COURT: Well, it seems very plain that he took in this policy to Gomery's office, because Gomery

had telephoned him the policy was cancelled. Now he took the policy in and gave it to Mr. Gomery in his office.

"THE WITNESS: That is right.

"THE COURT: And you did that because you had been informed that it was cancelled?

"A. Yes, sir."

The notice of cancellation was brought to Murl D. Springer's attention, he recognized the right of the insurer to cancel, acquiesced in the cancellation, and accepted a check for the return of unearned premium. He acknowledged the cancellation in an application for insurance made through the Assigned Risk Plan (Plaintiff's Exhibit 8 (52a, 330a). This Exhibit was not included in the Appendix but is on file with the Clerk of the Court of Appeals).

Murl D. Springer's driver's license had been automatically suspended when his policy of insurance with Citizens' Mutual was cancelled, and he was required immediately to return to the Michigan Secretary of State his license and registration.

> Section 530 of the Michigan Vehicle Code, Act No. 300 of the *Public Acts of Michigan* of 1949 (*Compiled Laws of Michigan* of 1948, Section 257.530; *Mich. Stat. Anno.*, Section 9.2230).

Recognizing the suspension, Springer himself had mailed his driver's license to the Secretary of State (59a, 64a).

The evidence exposing the false answers to questions 6 and 7 was uncontroverted and undisputed.

The Facts Relied Upon by Allstate to Sustain its Claim That a Rescission of The Policy Had Been Effected by Mutual Agreement of The Insurer And The Insured Were Undisputed.

The scheme by which the Springers obtained the policy from Allstate was flagrantly fraudulent. Murl D. Springer understood that Allstate would not have intentionally covered him by the policy, he having testified (106a):

"Q. You understood if you were driving that policy would not cover you?

"A. Yes, I understood that."

Erma F. Springer had been alerted to the fact that the insurer intended to declare the policy void from the beginning because of false answers contained in the policy declarations (237a, 238a). She testified (253a):

"Q. You knew that Allstate was planning to declare the policy void, from the talk you had with Mr. Marks there on November 16th, didn't you?

"A. I knew that, on November 16th, yes."

When the Springers were informed that the Company charged that they had made false answers in the policy declarations, they made no denial or protest (109a). When Mrs. Springer received the notice declaring the policy void, and the check for the refund of the premiums, she understood their purpose.

An agreement to rescind a contract may be shown by such circumstances or by such course of conduct as clearly evidences the intention of the parties that it should so operate.

White Pine Lbr. Co. vs. Manufacturers Lbr. Co., 191 Mich. 390.

Mrs. Springer recognized Allstate's right to rescind by accepting the return of all premiums paid by her, accompanied by a written denial of liability, and by her retaining such premiums.

Minor vs. Bewick, 55 Mich. 491;
McCutchan vs. Kansas City Life Ins. Co., ... Mo. ....., 122 S. W. 2d 59.

With respect to any claim by the Springers that they did not intend to acquiesce in the rescission, it is only necessary to reply that one must be held to have intended the necessary and direct consequences of his acts, and he cannot be heard to say to the contrary.

Whether or not intention to rescind a contract or provision thereof was present at the time the acts relied on in

that regard were done becomes a question for the Court where the facts are admitted or clearly established.

Klanian vs. New York Life Ins. Co., 68 R. I. 126, 26 A. 2d 608, 152 *A. L. R.* 87;
Annotation to the case last cited, 152 *A. L. R.* 95.

It would seem difficult to make the evidence of rescission more conclusive than it was here.

Hillock vs. Traders Ins. Co., 54 Mich. 531;
Mosser vs. Masons' Indemnity Co., 115 Mich. 672.

Where, as in the present case, an insurer elects to rescind a contract of insurance and the insured acquiesces in the rescission, the rescission is effected by agreement of the parties, and the insured's retention of the returned premiums operates as an accord and satisfaction.

3 *Appleman's Insurance Law and Practice*, 439, Section 1831.

The Court of Appeals therefore properly held that the question respecting rescission was improperly submitted to the jury and that the jury's finding in answer to the First interrogatory should be set aside.

COUNSEL DID COMPLY WITH RULE 51

Petitioners' contention that respondent's counsel failed to comply with Rule 51 is manifestly opposed to the record. At the conclusion of all the evidence, counsel for respondent made a motion for a directed verdict. The motion included the following grounds (265a, 266a):

"Third, it affirmatively appears from the undisputed evidence that Allstate assumed liability under said policy in reliance upon an answer, a negative answer to Question 6, which answer appears without dispute to be false and to relate to a material matter.

"Fourth, it appears affirmatively from the undisputed evidence that the insured gave a false answer to Question 7, and that Allstate Insurance Company

accepted the risk in reliance upon the answer given, which was material to the risk.

"Eighth, because it conclusively appears from the undisputed evidence that a rescission of the contract of insurance was effected by agreement of the parties as a result of Allstate's having served upon the insured a notice of disclaimer of liability or of rescission, together with the tender of a check covering all premiums paid by her, and by the insured's accepting and negotiating the check, and retaining the proceeds thereof."

Counsel for respondent proffered to the District Judge requests to charge the jury, as follows (275a):

"I charge you that you should find, as a matter of fact, that the answer contained in the policy declarations to question number 6 was false, in that a policy of automobile liability insurance issued by Citizens' Mutual Automobile Insurance Company to the defendant, Murl D. Springer, was cancelled by notice effective February 16, 1954." (No. 37).

"I charge you that you must find, as a matter of fact, that the answer to question number 7 contained in the policy declarations was false, in that the driver's license of the defendant, Murl D. Springer, was suspended at the time that his wife made application for insurance to the plaintiff." (No. 38)

The Judge refused to give the requests. Counsel for respondent unequivocally excepted to the ruling. The exceptions were in the words following (291a, 292a):

"The plaintiff excepts to the court's refusal to give its 37th request to charge, because counsel for the plaintiff feels that the undisputed facts establish the plaintiff's claim that there was actually a cancellation of the Citizens Mutual policy within the period specified; in fact, in close proximity to the insured's making the application, and that issue should not be submitted to the jury, as if it was a controverted one.

"Plaintiff excepts to the refusal of the court to give its 38th requested instruction, because plaintiff feels that it appears from the undisputed evidence that there was a suspension of Murl D. Springer's license within the specified period, and within the period shortly antedating the application for the Allstate policy, and for that reason the jury should not be allowed to treat the falsity of the answer to question 7 as a question of fact."

The preservation of respondent's right to have the Court of Appeals review the denial of its motions for a directed verdict and notwithstanding the verdict on the ground that a rescission of the policy had been effected by mutual agreement of the insurer and the insured was not lost by any failure to except to the Court's charge.

The question presented by this division of petitioners' petition was first raised by their motion for a rehearing made to the Court of Appeals.

CONCLUSION

For the good reasons hereinabove stated, the petition should be denied.

Respectfully submitted,

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Business Address:
410 Hackley Union Bk. Bldg.,
Muskegon, Michigan.

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No. 525

Office Supreme Court, U.S.
FILED
DEC 17 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

ERMA F. SPRINGER, MURL D. SPRINGER, CLARE GOODMAN, FORREST M. E. JOHNSON, ANNA GULCH, Administratrix of the Estate of Stephen Stanley Gulch, Deceased, DOROTHA E. SWARTZ, Administratrix of the Estate of HAROLD SWARTZ, Deceased, and INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Petitioners,

vs.

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Respondent.

PETITIONERS' REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

ERMA F. SPRINGER, MURL D. SPRINGER, CLARE GOODMAN, FORREST M. E. JOHNSON, ANNA GULCH, Administratrix of the Estate of Stephen Stanley Gulch, Deceased, DOROTHY E. SWARTZ, Administratrix of the Estate of HAROLD SWARTZ, Deceased, and INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Petitioners,

vs.

ALLSTATE INSURANCE COMPANY, an Illinois corporation,

Respondent.

PETITIONERS' REPLY BRIEF

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

ARGUMENT

SUFFICIENCY OF EVIDENCE TEST

In its brief, Respondent claims that the federal test on sufficiency of evidence should be applied in a diversity of citizenship case even though the state rule on sufficiency be different (R. Br. 2). Petitioners contend that the state test, not the federal rule, should be applied (P. Br. 5). Respondent does not dispute petitioners' assertion that the Michigan rule on sufficiency of evidence requires any evidence "however slight" to be submitted to the jury. Thus, the opportunity is presented to this court to resolve the present conflict of decisions in the several Circuit Courts of Appeals and to determine the issue as to whether the state rule or federal test on sufficiency of evidence should be applied in a diversity of citizenship case (P. Br. 5-7).

ISSUE OF FACT ON SPECIAL INTERROGATORIES

Respondent's assertion of facts, when supported by page references to the record, set forth only such facts in the light most favorable to respondent insurer, contrary to the findings of the jury (294-5a).

For example, on page 6 of its brief respondent alleges that "When the Springers were informed that the company charged that they had made false answers in the policy declarations, they made no denial or protest" and refer to 109a of the Record. Actually that citation refers to only Mr. Springer's testimony (not the insured) and only a part thereof supports the assertion. Murl D. Springer testified:

> "Q. Then you never made any complaint to any office[illegible] or agent of the Allstate Insurance Company, about the charges contained in that notice?
>
> "A. No, sir; *but I tried*" (109a).

The *insured*, Mrs. Springer, testified that she protested to Mr. Marks, adjuster for the Respondent-insurer as follows:

> "I said, 'Why, Mr. Marks, are you trying to tell me that I am not insured, after having this policy for nearly two years, paying for it on two different occasions * * *? I can't understand it * * * When we need you so bad now, there has two people been killed * * *.' He said: 'When it is only three or four thousand dollars, the company does pay off, but when it comes up to $40,000 claims we get out by hook or crook" (238a).

Many of respondent insurer's assertions of fact are not supported by the record and contain no page references thereto contrary to Rule 40 (R. Br. 5, 6). For example, the following assertions of fact quoted from page 6 of insurer respondent's brief, unsupported by page references to the record, are simply not correct.

> "When Mrs. Springer received the notice declaring the policy void, and the check for the refund of the premiums, she understood their purpose. * * *
>
> "Mrs. Springer recognized Allstate's right to rescind by accepting the return of all premiums paid by

her accompanied by a written denial of liability, and by her retaining such premiums."

The proof is undisputed that Mrs. Springer, the insured, never saw the check until it was produced in court the day of the trial of this case (240a). She had never read the letter (252a). Mr. Springer (who was not the insured) had opened the letter addressed to Mrs. Springer (the insured), had forged her signature to the check, and cashed it about two days before Christmas (240a). Premium refund was tendered back to respondent before trial and is on deposit with the clerk of the District Court (33a).

COUNSEL DID NOT COMPLY WITH RULE 51

Counsel's exceptions to the trial court's denial of requests to charge and the court's refusal to grant its motions for directed verdict or for judgment notwithstanding the verdict can in no way excuse *counsel's failure to object to the charge as given*, including the three interrogatories upon which the Court of Appeals reversed the District Court judgment. This is particularly so, where the trial court specifically requested counsel to object to the charge as given:

> "THE COURT: Mr. Rogoski, • • • you should also state on the record your objections to the instructions *which the court did give*" (292a).

While this error was first presented to the Court of Appeals in our Petition for Re-hearing, respondent claimed throughout the appeal that no issues of fact existed for the jury. No need arose to point out the error until the Court of Appeals' reversal was predicated unexpectedly upon the trial court's charge as given. To give the Court an opportunity to correct this error, petitioners first filed a petition for re-hearing in the Court of Appeals rather than proceeding directly with a Petition for Certiorari in this Court.

This case is typical of a few recent decisions in which Courts of Appeals have failed to heed the admonition of this Court only recently reaffirmed in *Daniel J. Scutiles vs. Inter-Carribean Corporation*, decided November 23, 1959:

"'It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review if the reasonableness of the particular inference or conclusion drawn by the jury. * * * The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.'"

WHEREFORE, it is respectfully submitted that petitioners' prayer for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals should be granted.

Dated: December 11, 1959.

Respectfully submitted,

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